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THE VIEW FROM GUANTANAMO BAY
**REFLECTIONS ON OMAR KHADR'S JOURNEY
THROUGH MILITARY INJUSTICE**

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INTRODUCTION

It was close to nine years ago: January 11, 2002. Twenty detainees, flown halfway around the world – hooded, handcuffed and shackled – arrived at the US Naval Base in Guantanamo Bay, Cuba. Thus began a preposterous misadventure in injustice that has become one of the most defining and enduring images of the so-called “war on terror” – images of orange jumpsuits, jail cells that were little more than cages, prisoners languishing for years without charge, hunger strikes and suicide attempts. Who would have ever imagined at the time that these images would soon come to ensnare and define the life of a Canadian teenager?

All of it has played out in one of the world’s strangest geopolitical corners: 45 square miles of US military might and muscle, nestled into a corner of the territory of one of the US’s most implacable foes, Cuba – a US prize won in the wake of the Spanish-American war, then transformed into a surreal anomaly once the Cuban Revolution, Bay of Pigs, and Cuban Missile Crisis turned the Cuban/US relationship upside down. But it still stands - and even before you consider its infamous role in the “war on terror,” it is in so many ways an alien, inexplicable place, outside the norms and rhythms of everyday life, and something that likely couldn’t now even be imagined, let alone created.

Yet, MacDonald’s, Starbucks, Pizza Hut and Subway are all close at hand. The outdoor movie theatre plays the latest Hollywood fare every night. Softball, go-carting, bowling and golf are all on offer. The local Girl Scout troupe has set aside a patch of scrub brush and a rocky beach with a proud wooden sign proclaiming “Camp Youngstown, Girl Scouts of America,” further compounding the oddity of the place.

Guantanamo is a corner of the world, it is worth noting, that has been a place of injustice before – such as when hundreds of desperate refugees and migrants from Haiti and Cuba were warehoused here in the 1990s. They had been intercepted by the US Coast Guard while taking their lives in their hands in an effort to reach US shores in overcrowded, rickety boats. Then, as now, US officials have chosen to use Guantanamo as a detention centre because they have believed they could advance a legal fiction that it was somehow a land without law, beyond the reach of US courts. It is an argument that had some early successes in US courts but was at long last put to rest in a series of US Supreme Court decisions that clearly recognized that US law and international law did extend to prisoners held at Guantanamo.

Since that first group of twenty’s auspicious inauguration in January 2002 of Guantanamo Bay’s latest turn in the detention game, it is thought that the naval base’s several prison camps have been home to 779 “war on terror” detainees from 48 countries, including 2 from Canada – Omar Khadr and his brother Abdurahman. The latter’s story of why and for how long he was held there remains confused and unclear but is thought to have been for approximately eighteen months in 2002 and 2003.

Of the 779 detainees who have called Guantanamo home over the past eight years, only five have ever been convicted - a whopping .6% of the total prisoner population. Just imagine if we had such a pathetically low conviction rate in our regular corrections system. And it is not as if the wheels of justice have spun overtime to secure those five convictions. Three of those convictions were on the basis of plea deals such as the one in Omar Khadr’s case and another

in the case of Australian David Hicks. Only two have proceeded through a full trial to conviction.

As of today, 174 prisoners from 27 countries remain in detention with Omar Khadr being the only Westerner. That means that 605 of the detainees, 77% of the original 779 - individuals who at various moments of Bush-era hyperbole were described as the worst of the worst and among the most dangerous men in the world - have been released. Not a fate that was to await Omar Khadr, though.

A FAILURE OF HUMAN RIGHTS SAFEGUARDS

Concerns about the failure to abide by a range of fundamental human rights safeguards at Guantanamo are now legion and well documented:

- There has been lengthy, in some cases, seemingly indefinite detention without charge or trial.
- At the outset, prisoners endured harsh and inhuman detention conditions, being held in facilities that were little more than outdoor cages, with very little protection from the elements.
- In early days, there was refusal to recognize that international or even US Constitutional rights protections, including something as fundamental as *habeas corpus*, had any applicability to the treatment of Guantanamo prisoners.
- For several years officials refused to provide detainees with access to visits from consular officials and did not allow them legal representation or contact with family.
- A long list of interrogation techniques have been used at Guantanamo which are quite clearly tantamount to torture or at the very least cruel, inhuman or degrading treatment or punishment; all of which are clearly prohibited under both international law and US domestic law. We know that even the ICRC communicated that concern to US officials.

Techniques included, to name only a handful: painful stress positions for lengthy periods of time, humiliating nudity, sensory deprivation, including through hooding, desecration of the Koran, threatened attacks by dogs, food deprivation, and sleep deprivation (the famous “frequent flyer” program to which we know Omar himself was subjected).

The aim of this paper, however, is not to generalize about the 779 prisoners who have been housed in Guantanamo’s various prison camps over the past 8+ years. It is to focus on just one of those prisoners: Omar Khadr.

THE SALIENT FACTS IN OMAR’S CASE ARE WELL KNOWN

Omar was born in 1986, in Canada. His father, Ahmed Said Khadr, moved his family – Omar, his mother, three brothers and two sisters – to Pakistan and later Afghanistan beginning in the late-80’s, with some back and forth to Canada. He did have some early schooling at an

Islamic school in Mississauga, but most of his school years, few as they were, came at an Islamic school in Peshawar, Pakistan or through home-schooling.

Famously, Omar's father was arrested in Pakistan in late 1995, accused of being involved in the bombing of the Egyptian Embassy in that country. Charges were dropped several months later and Ahmed Khadr was freed, after Prime Minister Jean Chretien raised his case with Pakistan's then-Prime Minister, Benazir Bhutto. That episode came back to haunt Prime Minister Chretien when Ahmed Khadr's extensive involvement in sympathizing with al Qaeda and supporting terrorist activities, particularly by arranging financing, later became quite notoriously well known – including his almost certain involvement in the Egyptian Embassy bombing. But it not only haunted Prime Minister Chretien, it led to a strong reluctance on the part of Canadian politicians to take up cases of Canadians accused directly or indirectly of involvement in terrorism out of fear that the allegations would later prove true. This is undeniably one of many factors that explains the Canadian government's resistance over the past eight years (during both Liberal and Conservative governments) to advocate on Omar's behalf.

The back and forth between Pakistan, Afghanistan and Canada continued for young Omar Khadr for some time, but with less and less of his time spent in Canada. His upbringing came to be entirely dominated by the social milieu his father had chosen, which included the families of Osama bin Laden and many other senior al-Qaeda leaders. He was surrounded by talk of extremism, fanaticism and violence. This is precisely where he found himself in September 2001 when the world was turned upside down by the September 11th terrorist attacks as well as one month later on October 7, 2001 when US and allied forces launched war against Afghanistan's then Taliban government and their al-Qaeda allies.

Even then, Ahmed Khadr did not evacuate Omar and Omar's siblings – who ranged from 10 to 22 years of age at the time – to safety. Instead he took them deep into the devastation of war. Omar and his brothers – two older, one younger – spent time in al Qaeda training camps. Ahmed Khadr took Omar, who by all accounts has quite a talent for languages, with him as he travelled around Afghanistan. By 2002 Ahmed had arranged for then-15 year old Omar to assist an al-Qaeda allied cell involved in making improvised explosive devices (IED's) that was in need of an Arabic/Pashto translator, in the Afghan village of Khost. This is not the sort of decision one would hope that a father would make about his son's activities. As Omar's military-appointed defence counsel, Lt-Col Jon Jackson simply but poignantly put it in his opening address to the jury when Omar's trial at Guantanamo opened in August of this year: Ahmed Said Khadr was a man who "hated his enemies more than he loved his son."

OMAR'S CAPTURE AND DETENTION

Khost, Afghanistan is where Omar was on July 27, 2002 when the compound in which he was housed was attacked by a joint US Special Forces/Afghan militia team that eventually came to number about 100 men. Over the course of several hours, there were exchanges involving AK47's and other small arms fire, grenades and a pounding from the air when a US airstrike was called in, culminating with two 500 pound bombs being dropped on the compound.

In the aftermath, as the compound lay largely in ruins, a small team of US soldiers was sent in to mop up and secure the area. Incredibly, Omar and one other fighter were still alive – but

they were quickly shot by one of the Special Forces officers who had entered the compound. For Omar Khadr, this meant two shots in the back which, remarkably, did not kill him, though very nearly did. In fact, he was initially left for, and assumed to be, dead. The other remaining fighter was shot in the head and is thought to have died instantly.

In the meanwhile, however, either Omar or the other man had lobbed a grenade a fair distance, and fragments from that grenade explosion gravely injured a US Sgt, Christopher Speer. Until last month Omar had adamantly and consistently insisted that he did not throw the grenade. But as the last sitting of his trial opened, he changed his plea to “guilty” to all charges, including the charge of having thrown that grenade, further to a plea deal concluded between his lawyers and US government lawyers. Sgt. Speer was evacuated – ironically, alongside Omar – but he died at a US military hospital in Germany 10 days later.

It is, beyond a doubt, miraculous that Omar Khadr even survived that day. Cynics suggest it was because someone had overheard Omar whisper something in English that made the military decide that his was a life worth saving, recognizing he could be a valuable source of intelligence information. Whatever the motive, military doctors worked admirably to save his life. A specialized ophthalmologist was even flown in from Germany at one point to perform sensitive surgery on his eyes - he has lost sight in one of his eyes and remains with considerable problems in the other, in which shell fragments are permanently embedded.

Having saved his life, the US military certainly had no further favours in store for Omar Khadr. He was held at the notorious Bagram Air Base for three months. During that time he was interrogated relentlessly. Omar has made quite detailed allegations as to the torture and mistreatment he went through during those sessions – some of which he went through while still badly injured and recovering from his wounds and surgery. Here is a sampling of how Omar’s lawyers describe his treatment at Bagram, in court documents filed last year:

“Upon regaining consciousness one week later in the tent hospital at Bagram, Mr. Khadr was immediately interrogated by military officials. The interrogators noted that he was very weak and disoriented from pain, fatigue and sedation. Over the next three days, he was questioned several times by an American soldier. When the soldier did not like Mr. Khadr’s answers, the soldier would shackle Mr. Khadr’s hands and feet to his side. Because of his injuries, this caused him great pain. No doctors or nurses were present during these interrogations. After two weeks in the tent hospital, Mr. Khadr was taken on a stretcher to an interrogation room at the military camp at Bagram. He waited alone for an hour and was then interrogated for three hours. The interrogator was a skinny blonde man who screamed at Mr. Khadr when he did not like his answers. Several times, the interrogator made him sit up in the stretcher because the interrogator knew it would hurt him. Mr. Khadr cried several times during the course of the interrogation. Although he resisted at first, Mr. Khadr eventually gave the interrogator the answers he wanted to hear so that the interrogator would stop hurting him.”

The description of his treatment at Bagram goes on:

- Sounds of people screaming, day and night;
- Confined to a stretcher for two weeks to a month and interrogated relentlessly during that time;

- Barking dogs brought into the interrogation room while a bag covered his head;
- Cold water thrown on him during interrogations;
- His hands tied to the top of a door frame or ceiling, forcing Omar to stand for hours at a time, despite the pain of his injuries; and
- Threats of rape and beatings at the hands of large black men and Nazis in American prisons. Notably, this has been confirmed by the interrogator who made these threats.

On October 27 2002, Omar Khadr was transferred to Guantanamo where he remains, over 8 years later. His torture and mistreatment continued well into 2003, including demeaning incidents such as the time Mr. Khadr describes being used as a human mop to clean up his own urine on the floor of an interrogation room, with his hands and feet shackled behind him. He was also subject to the extensive use of sleep deprivation through Guantanamo's infamous "frequent flyer" program, during which he was constantly moved from cell to cell every three hours over the span of three weeks in early 2003. Notably, that occurred in advance of a planned visit by Canadian intelligence officials, the first of several Canadian interrogation sessions of Omar at Guantanamo Bay. Omar was put through the frequent flyer program at that time to "make him more amenable and willing to talk."

A JURY OF HIS PEERS

His case was selected to be one of a handful to come to trial before a military commission at Guantanamo. Not only has Guantanamo justice not been fair for Omar, it most certainly has not been speedy. He was first arraigned in 2005 – five years ago. Those charges were thrown out in 2007 when a military judge ruled he had no jurisdiction because Omar had been improperly labeled an "enemy combatant" whereas he only had jurisdiction to proceed with trials against "unlawful enemy combatants". The charges were later reinstated by a review panel that overruled the judge.

Eventually, the trial got underway. It was scheduled to begin in late January 2009 with hearings to deal with a number of pre-trial issues. That session was, of course, overtaken by political developments when President Obama made his famous, now broken, promise within 24 hours of his inauguration to close Guantanamo by the end of January 2010. The hearings were adjourned and the prevailing wisdom was that Omar Khadr's Guantanamo debacle would come to an end. How wrong that view proved to be.

By October 2009, President Obama had backed away from his promise. To the astonishment of many, it soon became clear that bringing Omar Khadr's case before a reformed military commission process would be among the first things that the Obama administration would do to convince the world that a new and better commitment to justice now prevailed at Guantanamo Bay. A child soldier, who has made detailed allegations of torture and ill-treatment in US custody, whose crime, if found guilty, is not about terrorism but rather, throwing a grenade that killed a soldier in the midst of a war. This is the new face of justice at Guantanamo Bay?

Lo and behold, the trial did indeed go ahead. I travelled to Guantanamo three times this year to observe the proceedings. In April, Omar's lawyers argued that statements and confessions that had been extracted from him during more than 100 interrogations at the hands of more than 30 interrogators at both Bagram and Guantanamo from 2002 through to early 2004 should be excluded from the trial because they were either directly or indirectly products of torture.

In August the full trial was supposed to go ahead, but only four days into the proceedings, Omar's military-appointed defence counsel, Lt-Col Jon Jackson, collapsed in court. That led to an unexpected recess of sixty days.

The trial was scheduled to continue on October 18th, and was anticipated to last about four weeks. However, on October 14th the resumption was pushed back by a week, amidst swirling rumours that serious discussions about a possible plea deal were underway. By the time the case resumed on October 25th, the rumours proved true. Omar changed his plea from not-guilty to guilty on all five charges: murder, attempted murder, conspiracy, material support to terrorism, and spying. What was initially kept secret was the prison term that had been agreed in the plea deal, though the worst kept secret was that it would be eight years, with one further year served at Guantanamo.

THE CANADIAN CONNECTION

Alongside these developments in Cuba, there was of course much legal activity in Canada as well. Three times Omar's tenacious pro bono Canadian legal team have turned to the Canadian courts. Three times their efforts were vigorously opposed by Canadian government lawyers. Three times, the courts sided with Omar.

The first instance was a Federal Court injunction in 2005 ordering CSIS to desist from any further interrogations of Omar at Guantanamo.

Next, his lawyers went to court to get copies of materials CSIS and other government officials had compiled after those interrogations and shared with the Americans. That went all the way to the Supreme Court of Canada which, in May 2008, again ruled in Omar's favour. Notably, the Court found that government officials had violated his rights under the Charter of Rights and Freedoms when they interrogated him at Guantanamo in circumstances which clearly contravened international human rights requirements.

And finally, his lawyers went to court to try to force the Canadian government to seek Omar's repatriation from Guantanamo to Canada. In January 2010, a unanimous Supreme Court of Canada concluded that Omar's Charter rights were still being violated. They did not feel it was their role to specify what remedy the government should pursue as redress for the violations, but made it clear a remedy was necessary. Not about to back down, the government did not pursue a repatriation request in response to the Supreme Court ruling. Instead they chose to send a low level diplomatic note asking US officials to consider, possibly, not making use of any material they had received from Canadian officials at Omar's military commission trial. US officials refused. Canadian officials made no further effort to comply with the Supreme Court ruling.

In July, a frustrated Federal Court judge gave the government seven days to demonstrate what remedy it was going to pursue. The government appealed that decision and convinced the appeals court to put the judge's deadline on hold until the appeal could be dealt with. That appeal has still not been heard and is obviously, to say the least, moot now given the outcome of Omar's trial at Guantanamo.

Such is the chronology. Where does it leave us? A crashing, careening end two weeks ago after a fictitious week-long sentencing hearing. A military jury recommended a stunningly punitive 40-year sentence (all for naught of course, as the eight years agreed in the plea deal takes precedence).

The following are a series of reflections, large and small moments that were not always picked up in media coverage, from various episodes over the course of three trips I took to Guantanamo this year..

FIRSTLY: THE RULES

When we arrived in April for two weeks of arguments as to whether Omar's statements should or should not be excluded from the trial, we were faced with a very substantial hurdle. While President Obama had, in the end, chosen not to follow through on his promise to close Guantanamo, he did see through some changes to how military commissions would operate. A revised Military Commissions Act was passed in October 2009, but six months later, as we prepared to head into court, the rules to govern the actual operation of the reformed military commissions were nowhere to be found. On the night before hearings were to get underway there were still no rules. Rumours began to circulate that the hearings would be cancelled – how could things go ahead, after all, without any rules? But things changed overnight. Sometime in the wee hours, the rules – several hundreds of pages long – were approved by the Secretary of Defense, and an hour before the hearing was to begin, a copy was given to the defence team. They were given a four hour adjournment to read and familiarize themselves with the new rules. It was yet one more sharp reminder of the lack of independence that mars the entire military commission process. The judge works for the Secretary of Defense. The prosecution lawyers work for the Secretary of Defense. The Secretary of Defense writes the rules that govern the entire process. Even Omar's lawyer works for the Secretary of Defense. Yet Omar is expected to have confidence that this system will deliver a fair – and independent – trial.

SECONDLY: EYES AND EARS

In April, a controversy arose when Omar protested a change in the rules governing how he was brought back and forth between the courtroom and Camp 4, where he was being detained quite some distance from the court building. As the hearing began one morning, Omar was very notably not present. A prosecution witness took to the stand and testified that when he was brought to the van that was to bring him to the hearing early that morning, he refused to put on a tight-fitting, blacked-out goggles and ear piece unit which he was told he must wear. He apparently described it as a humiliation. It is important to recall that during the firefight that led to his capture in 2002, Omar experienced considerable shrapnel damage in both of his eyes and is now entirely blind in his left eye and suffers considerable pain and discomfort in his right. She told him that he had the right to attend the hearing and a refusal

to do so could be held adversely against him. That is how it was left, and she was now in court providing that account.

Omar's legal team sought to call their own witnesses to provide more information as to what had happened. They proposed calling Dr. Zenakis, a psychiatrist /physician (also a retired Brigadier General) who has an extensive history of interviewing and assessing Omar. Nate Whitling, Omar's Canadian lawyer who was there to assist, was also prepared to testify as to his knowledge of an exchange a Canadian consular officer had with Omar about the issue, including that the use of the "goggles" in the van (which has no windows in the back) was apparently a new and unexplained requirement.

The judge refused to hear from them. He indicated that he was not prepared to "second-guess" security decisions made by military officials on the base. The temptation was very strong to stand up in the back of the courtroom and ask: "If you are not prepared to second guess, your honour, who will? Is it not a judge's very job to do precisely that? To second guess?" It was not a moment where guilt or innocence hung in the balance – but it was a very simple, stark illustration of the lack of independence that plagues military commissions.

THIRDLY: THE SUPPRESSION RULING

Extensive evidence, both through witnesses and documentation, was presented to the judge in April laying out the numerous, credible allegations Omar has made with respect to the torture and ill-treatment he has endured at the hands of his captors. Quite remarkably, this was confirmed in at least one instance under oath by the interrogator responsible for the mistreatment, specifically the threats that Omar would be sent to a prison in the US where he would likely be raped by "big black men and Nazis." It is worth remembering as well that Canadian courts had based their decisions about Charter violations on a finding that Omar had, among other forms of mistreatment, been subjected to the frequent flyer sleep deprivation program. Omar's lawyers argued that the various statements and confessions taken from Omar during his first two years in detention were so directly and indirectly tainted by this torture and other mistreatment that all should be suppressed and not allowed to be entered as evidence at the hearing. It is a crucial human rights concern and one that has been troubling about the military commission process from the very beginning. It was also central to the future of the case. If the suppression motion was granted and the statements excluded, the prosecution would have been left with virtually no evidence against Omar. If it failed and the statements went in, the balance would swing very much the other way and make Omar's conviction a strong likelihood.

The judge was not swayed. In August, he ruled in a stunningly terse 90-second decision, that all of the statements would be admitted into evidence. Several weeks later, his written reasons for the ruling were released; most simply referred to the fact that Omar had not taken to the stand and submitted himself to cross-examination of his torture allegations.

This issue reared its head again during the fictitious sentencing hearing in front of the jury. Omar's lawyers asked to enter into evidence the transcript from the sworn testimony of the interrogator who had admitted to threatening Omar with rape. The judge again refused. He made it clear that he had already dealt with the issue of torture and ill-treatment and would not revisit it.

FOURTHLY: JURY SELECTION

I arrived at court for the beginning of two days of jury selection in August with my mind made-up that this was simply going to be one more example of the lack of independence. In the end it largely was, but not without some interesting twists and turns. We began with 15 possible jurors with a minimum of five needed for the trial to go ahead. The strategy of objections and challenges was like watching a chess game. Troubling, but not surprising, was the vehemence with which government lawyers sought to uncover any potential jurors who had ever read about any of the human rights concerns associated with Guantanamo Bay. Troubling, but again not surprising, was that the majority all smilingly indicated that they had never read or heard a whisper of concern about Guantanamo. Only three of the potential jurors had and were, in fact, quite forceful in laying out what they knew and describing their own concerns about things like detention without charge or trial, cruel treatment and the negative impact on the US's international reputation. One of the three was quite savvy in defending his own concerns by referring to the fact that they were shared by President Obama, who is after all the Commander in Chief of US Forces. That led to one of the more peculiar moments of the hearing when government lawyers sought to have that juror dismissed, arguing that the degree to which he kept insisting that he agreed with the President when it came to Guantanamo Bay was clear evidence that he was biased against the government. One was left wondering just who they conceived the government to be. They did not succeed in having that juror excluded for cause but later used their one peremptory challenge to have him thrown out.

PSYCHIATRIC EXPERTS

Perhaps the most frustrating side to the sentencing hearing came down to what psychiatric evidence was heard and not heard. The one psychiatric witness who was heard was Dr. Michael Welner, who testified for the government. This was the first time he had ever been asked to formulate an opinion on the future danger posed by, as he kept describing Omar, a "radical jihadist". Dr. Welner testified that he spent about 500 – 600 hours working on the Omar Khadr case – only 8 hours of which, or about 1 ½ % of his time – was taken up with actually interviewing Omar. Not having previous experience to draw upon, Dr. Welner heard of a Danish doctor, Dr. Nicolai Sennels, who had developed a framework in a book called *Among Criminal Muslims* for assessing the likelihood of once radical jihadists continuing to pose a danger after being released from prison. Much was troubling about the framework, including the degree to which it led to Omar's religious devotion, such as the fact that he had memorized the Koran and regularly led prayers with other prisoners, being used against him. Upon cross examination it became clear that Dr. Welner actually knew very little about Dr. Sennels. In fact, Dr. Welner hadn't actually read Sennels' book, as it is only available in Danish. He apparently had only had a phone conversation with the Danish doctor. However, a basic Google search readily exposes Dr. Sennels as a racist and bigot. Dr. Sennels talks of Muslims as prone to inbreeding (in fact he says that half of all Muslims in the world are inbred); calls for an end to Muslim immigration to the West; and calls for punitive measures to be put in place to encourage Muslims already in the West to leave. He describes the Koran as a "criminal book", and says that having a Muslim on his couch (he's a psychologist) is like "having someone from another planet."

Meanwhile, the defence found itself in an impossible quandary. Two remarkably dedicated mental health professionals, Retired Brigadier General Steven Zenakis and Bellevue Hospital-based psychologist Dr. Kate Porterfield have, between them, carried out over 300 hours of interviews of Omar over the past two to three years. There can be no individuals who have more informed insights into his mental state. Both have made it very clear that they see great potential in Omar Khadr and do not believe he poses a risk or danger.

Unfortunately, neither doctor testified. I am not privy to all of the defence team's strategic decisions, but I do know that a key problem was the fact that Omar had pleaded guilty in the end. It is a guilty plea that is widely understood to represent an escape from Guantanamo rather than a true admission of honest guilt. However, that gave rise to an impossible dilemma. Imagine the inevitable cross examination: "Dr. Z, Dr. P., we now know, through his guilty plea, that Omar carried out these terrible crimes. You must have spent a great deal of time talking about that with him – please share with us what he talked about when it came to his sense of responsibility and remorse for these crimes." Under such circumstances should the doctors tell what many expect would have been the truth: "Well no, that is not what we discussed – in fact he described to us that he had not committed these crimes and felt hopelessly trapped in the unjust legal system at Guantanamo." The next question would then become, of course: "Are you saying he lied to the court when he entered his guilty plea, or are you saying he lied to you during your interviews, in which case why should we believe anything he may have told you?" Additionally, this dangerous situation would have been for a sentencing hearing that was largely a fiction and a sham, given the plea deal waiting in the background.

So the jury – and the world at large - never heard what I know would have been powerful and insightful testimony from these two doctors. They were left only with the inflammatory findings of a psychiatrist who hardly knew Omar and based his analysis on the work of a racist Danish psychologist, written in a language he did not understand.

FINALLY: A REMARKABLE CAPTAIN

Finally, a word about one of the least heralded yet quite remarkable witnesses – one of only two who testified on Omar's behalf. He was a Navy Captain with some 25 years of military service. He testified by video conference from Kabul, where he is now the lead legal officer for US forces in Afghanistan. He had previously been the senior legal officer at Guantanamo Bay for over two years and during that time had frequent interactions with Omar Khadr. He had earned quite a reputation with defence lawyers at Guantanamo as being hard-nosed and seeming to go the extra mile to make it more difficult for them to have access to their clients. In his own words, he was "testifying for the first time as a witness for the defence in a criminal case." This was not, one would expect, the sort of move that carries favour with superiors and looks good on the resume of a person who may have ambitions to advance further through rank and postings. Nonetheless, he very clearly stated that he believes that Omar Khadr has rehabilitative potential. He talked of Omar as a moderate and someone who was very helpful in diffusing tensions among the prisoners and finding ways to resolve disagreements and misunderstandings between prisoner and prison officials. He emphasized that in his opinion, it is crucial to take into account Omar Khadr's young age at the time of the firefight in Afghanistan and the influence of his father in propelling his son out onto the battlefield.

There is a great deal more to examine in this case than space permits, including:

- The system of ever-present military escorts who accompanied our small group of NGO observers absolutely everywhere we went except the one bit of freedom we were allowed – to head off and jog wherever and whenever we wished.
- The irony of there being an impressive set of laws, backed up with onerous fines and even the possibility of jail time, to protect iguana life at Guantanamo – no feeding, no killing and no eating iguanas – while human life has been so often treated with contempt.

From this sorry spectacle, absolutely nobody and nothing has won. Everyone and everything emerges a loser.

THE OUTCOME

Certainly Omar Khadr has not won. He has been dragged through a blatantly unfair trial process, during the final days of which he agreed to plead guilty. It is a process that refused at every turn to give serious attention to various pressing human rights concerns. Ignored were the facts that he was a 15-year old child when he was arrested and that he had long before been propelled into a world of extremism and violence by his fanatical father. It is staggering to see the unrelenting determination of both the US and Canadian governments to go out of their way to pretend that binding international human rights standards dealing with the protection and rehabilitation of child soldiers are not relevant. On the Canadian side of this issue, let us not forget that Canada led global efforts just over a decade ago to craft those very standards. It is a humiliating about-face - from admirable champion to recalcitrant nay-sayer.

Equally, grave concerns about how Omar Khadr was treated by US officials, particularly in the early days of his imprisonment, have been consistently swept under the carpet. Omar Khadr's case has very powerfully demonstrated that the military commission process is not prepared, and in fact not even interested, in ensuring that torture and ill-treatment are not only firmly rejected during trials but also vigorously investigated and prosecuted outside the courtroom.

Those individuals who suffered personal loss or injury as a result of the July 27th 2002 firefight at the heart of his case have also not won. That includes the family of Sgt. Christopher Speer, the US soldier killed by the grenade that Omar has now said that he threw. Fair trials matter, and at their core is the principle that an accused's rights must be protected, to avoid miscarriages of justice. But more than that, fair trials also allow anyone with a direct interest in the case, and the general public as well, to have confidence that the outcome reflects the truth and is just and appropriate.

Do we come to the end of Omar Khadr's travels through the military commission process with that sense of confidence? No, we do not, as we are left with no confidence, one way or the other. Maybe he meant it when he pleaded guilty. On the other hand, given everything that was stacked against him in this trial, it would most certainly not be surprising to learn that he chose to plead guilty because he had decided that it was his last resort, his only way to one day, finally find his way out of Guantanamo. It leaves little confidence that the guilty plea represents anything more than an escape from injustice.

So the accused doesn't win. Victims and the public don't win. Security has also not won. Is the world a safer place because we have locked up a young man whose domineering father propelled him into a world of extremism when he was nine years of age? A young man who ultimately found himself in the middle of a war, as a 15-year old, during which he says he threw a grenade that killed a US soldier? A young man in whom many see real potential for rehabilitation? It does not seem likely.

This suggests that the US taxpayer has been no winner either. It would be hard to affix a price tag to eight years of detention and five years of prosecution of Omar Khadr, but it is entirely possible that the costs run into the tens of millions of dollars. Add to that the millions that the Canadian government has likely spent trying to reverse and avoid the many Federal Court, Federal Court of Appeal and Supreme Court of Canada judgements over the past several years, ordering them to take action to remedy violations of Omar's rights. The final sum could well be astronomical. As a human rights activist, I believe that there should never be a price tag on justice. But there most certainly should be a price tag on injustice.

It is a tremendous waste – how many more productive ways this money could have been spent. Even a very small fraction of the fortune spent on this propagation and defence of injustice would have gone far in providing the treatment and reintegration he deserved as a child soldier.

The rule of law has also been a clear loser. Omar Khadr has been convicted of war crimes, on the basis of legal definitions hastily rewritten by the US government following September 11th. The central charge he faced was killing a soldier, during an armed conflict – a soldier who was actively engaged in combat. His death is not a happy occasion - no death in war ever is. But most experts, and likely most of the general public, would scratch their heads and ask if that is not what happens in war. Soldiers get killed, unfortunately, and numerous US and international legal scholars insist there is absolutely no legal basis for characterizing what Omar Khadr has been convicted of as a war crime.

Finally, there is Canada's reputation as a global human rights leader, which has certainly not won. Right up to the very end, the determination of the Canadian government to appear unconcerned was stunning. In fact, as the week unfolded their only preoccupation appeared to be to convey to the world at large, in every way possible, that they were disinterested, uninvolved and had nothing to say about the case, even when their involvement in bilateral talks with US officials had been confirmed. Last minute interventions from two UN human rights experts, the UN Secretary-General's Special Representative on Children and Armed Conflict and the UN Special Rapporteur on the protection of human rights while countering terrorism calling for Canada to intervene on Omar Khadr's behalf went unheeded. So too have calls from so many courts and independent experts.

In the aftermath of our bruising loss in UN Security Council elections last month, and the many questions since about Canada's deteriorating global reputation as a human rights champion, the time was ripe for a principled Canadian stand in Omar Khadr's case. The Canadian government remained defiantly unwilling.

CASE CLOSED?

Is this case closed then? Absolutely not, though there is a real risk of a loss of interest by the media, politicians and even the public.

Most immediately, there are concerns about the likelihood that Omar, who has thrived in the more open and communal detention conditions of Guantanamo's Camp 4 over the past two to three years, will now go through a setback if transferred, as expected, to the near isolation of detention in Camp 5. The Canadian government should be intervening forcefully about those concerns and pressing for assurances that his detention over the coming year will offer him the rehabilitation to which he is entitled under international human rights standards dealing with child soldiers and children more generally. These standards also clearly state that he should be given maximum possible opportunities for social interaction, physical recreation, and educational programming.

Next, there is the question of his wish to return to Canada and what will await him here. We need to hear a clear statement from the Government of Canada that his transfer application will be accepted. The Government further needs to work with Omar Khadr's legal counsel to ensure that measures are put in place upon his return that safeguard his rights and provide him with treatment and support for the violations he has experienced.

Finally, there is the question of justice and accountability. There has not yet been a remedy in response to the January 2010 Supreme Court ruling. There have been no investigations, let alone prosecutions or remedies, for the many violations, including lack of protection as a child soldier and the torture and ill-treatment he has gone through at Bagram and Afghanistan. US authorities should be pressed on these matters, and it should be the Canadian government's voice that is the loudest in making that demand.

Beyond these measures that are needed to respond to the ongoing human rights concerns in Omar Khadr's case, there is a need for law and policy reforms to ensure that something like this does not happen again. Similar cases have happened far too often and have left a deepening feeling that Canadian citizenship does not mean the same thing for all Canadians. Reforms are needed:

- To ensure that a Canadian citizen will not be abandoned by his/her own government when facing serious human rights violations in another country.
- To ensure that Canadian officials do not become complicit in those overseas violations.
- To ensure that there are clear avenues for redress and accountability when things go awry.

The blueprint for at least some of that already exists, particularly in the policy recommendations that Justice Dennis O'Connor made in part two of the Maher Arar Inquiry. This included a proposed comprehensive overhaul of the review and oversight of agencies involved in national security investigations. Four years later, the Government of Canada has

not yet taken up those recommendations and is instead pursuing a dramatically less comprehensive and effective tinkering instead of an overhaul, limited only to RCMP oversight.

Alongside the Arar Inquiry proposals, there is a need for law reform in the area of consular assistance. It should be enshrined into Canadian law that deciding whether to come to the aid of an imprisoned or otherwise distressed Canadian abroad is something that should not be left to the whim and discretion of officials and the prevailing politics of the government of the day. Instead, it must be clearly established to be a duty and obligation of the government to do so, on behalf of all Canadians, no matter their race, religion, political affiliation or family background.

Unless we make and implement these changes, other similar travesties are almost certain. We cannot stand for that. When it comes to a case like Omar Khadr's, and the many other Canadians who have been treated as less than equal citizens at times when they needed their government's support and protection the most, our mantra must be "never again".



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